SUPREME COURT, U.S.
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No. 80-1302

In the Supreme Court of the United States

OCTOBER TERM, 1980

EARL DAVID SHAFFER,
Petitioner,

VERSUS

DAVID M. COOK, LARRY D. LAHMAN
and STEPHEN JONES,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

MEMORANDUM OF RESPONDENT STEPHEN JONES IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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April, 1981

QUESTION PRESENTED

Whether a private party alleged to have conspired with an immune state officer can nonetheless be held liable under 42 U.S.C. Sec. 1983 where the state officer is entitled to absolute immunity for his acts on which the claim is based.

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EARL DAVID SHAFFER,
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DAVID M. COOK, Oklahoma County District Judge,
LARRY D. LAHMAN and STEPHEN JONES,
Respondents.

MEMORANDUM OF RESPONDENT STEPHEN JONES IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 1a-3a) is reported at 634 F.2d 1259 (10th Cir. 1980).

JURISDICTION

The judgment of the Court of Appeals (Pet. App. 1a-3a) was entered on November 5, 1980. On February 2, 1981, Petitioner filed a petition for Writ of Certiorari. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. 1983 provides as follows:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or

Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT

1. Petitioner, Earl David Shaffer, appearing *pro se,* brought this action against David M. Cook, an Oklahoma County District Judge, and Larry D. Lahman and Stephen Jones, private attorneys licensed to practice in the State of Oklahoma. Petitioner alleged that said parties conspired to defraud him and deprive him of due process and equal protection of the laws, in violation of his Civil Rights under 42 U.S.C. 1983, 1985 and 1986.

This action was commenced following a lawsuit that Shaffer brought against Jones in the state district court of Oklahoma County, Oklahoma. That action, which sought over $10 million in damages from Jones, was assigned to Judge Cook, District Court Judge for the Seventh Judicial District of Oklahoma. Jones retained Lahman to represent him in that action. After Judge Cook dismissed Shaffer's action against Jones, Shaffer filed the instant action against Judge Cook, Lahman and Jones, claiming that all of the above said parties had conspired against him in the state court action to violate his federal civil rights.

2. The present suit, based on 42 U.S.C. 1983, 1985, and 1986 makes the following allegations. Insofar as Respondent Jones is concerned, Petitioner alleges that Jones par-

ticipated in the purported conspiracy in the following manner:

> "Defendant, Stephen S. (*sic*) Jones was a defendant in a case CJ-76-3316 (*sic*) and accepted the fraudulent acts which were performed by David M. Cook and Larry Lahman in his behalf and filed an affidavit to further their acts of conspiracy to defraud the plaintiff."

Petitioner alleges that Lahman participated in the alleged conspiracy as follows:

> "(a) There were obvious contacts between Judge Cook and Lahman before each hearing in the state court case because Shaffer saw Lahman in Judge Cook's Chamber hallway before each hearing . . .
>
> "(b) Judge Cook would 'openly in court further conspire with Larry D. Lahman'; Judge Cook visibly and orally exhibited his 'demeanor' towards Shaffer; that Judge Cook had no intention of being fair and impartial; and that Judge Cook stated that he wished that he could dismiss the case with prejudice . . .
>
> "(c) That Lahman caused fraud upon Shaffer in the state court case by mailing to Shaffer an instrument showing a Certificate of Service on February 14, 1977, but which Shaffer did not receive until February 18, 1977, with a postmark of February 17, 1977 . . .
>
> "(d) Lahman made false and fraudulent statements about a conspiracy alleged by Shaffer in the state court case, and that this resulted in Judge Cook entering an order striking conspiracy from plaintiff's state court petition . . .
>
> "(e) Judge Cook refused to disqualify himself upon request but continued to conspire with Lahman to deny Shaffer a fair trial, due process of law and equal protection of the law . . .

"(f) Judge Cook entered an order on October 28, 1977, dismissing Shaffer's state court action. This alleged fraudulent action was discussed and agreed to in open court by Judge Cook and Lahman."

Finally, in regards to Judge Cook, Petitioner alleges the following acts:

"(a) That he exhibited 'an actual bias and prejudice';

"(b) That he denied appellant certain constitutional guarantees, to-wit: fair and impartial hearing, equal protection of the law and due process of law;

"(c) That he conspired with the co-defendants to 'defraud' appellant of those constitutional rights;

"(d) That he made certain 'unreasonable, dishonest, and unlawful decisions' in furtherance of that conspiracy;

"(e) That his acts were intentional;

"(f) That he failed to disqualify himself on appellant's request; and

"(g) That the foregoing violations were of such magnitude as to constitute 'non-judicial acts' tantamount to divestiture of jurisdiction."

3. The district court on October 11, 1979 disposed of all of Petitioner's claims stated above by dismissing his federal court suit. In its ruling the court dismissed Judge Cook on the basis that he was entitled to absolute immunity under all three causes of action. Insofar as respondents Jones and Lahman were concerned, the district court held that they were similarly immune under the rule that a private person cannot be held liable for conspiring with an immune state official. In addition, the district court

judge ruled that the 42 U.S.C. 1984 and 1985 actions were improperly filed because the pleadings did not reflect any complaint of racial or other class-based discrimination.

4. In a decision dated November 5, 1980, the Tenth Circuit Court of Appeals affirmed the federal district court's dismissal of Petitioner's complaint. In doing so, however, the court noted that there was *no absolute immunity* for a private person who conspired with an otherwise immune state official. Instead the court ruled that such immunity would exist only where the plaintiff failed to plead the existence of a significant "nexus" or entanglement between the absolutely immune state official and the private party in relation to the steps taken by each to fulfill the objects of the conspiracy. While affirming the decision of the district court, the Tenth Circuit made it clear that such resolution was to be made on a case-to-case basis rather than being covered by any blanket *per se* rule. In addition, the Tenth Circuit reaffirmed the rule that 42 U.S.C. 1984 and 1985 were inapplicable where there was no racial discrimination alleged.

SUMMARY OF ARGUMENT

Respondent Jones believes that the question presented to this Court is indeed an important one. He is compelled by Disciplinary Rule 5, Okl. St. Ann. Ch. 1 App. 3 DR 7-106(B)(1) to point out to this Court that there does exist a conflict among the circuits in regard to the question in issue. In addition, under any fair reading of the civil rights acts it is clear that the question posed is one of important public policy and should be answered by this Court. However, Respondent believes that this is not the proper case to do so. The Petitioner is appearing herein *pro se*. In addition, he has appeared *pro se* throughout numerous state court proceedings and through the entire gambit of lower court and appellate court proceedings in the federal system. Petitioner has not framed nor briefed the issues in this Court or any court below in a manner helpful to the proper resolution thereof. An examination of the pleadings Petitioner has filed herein will demonstrate why this Court should not decide the question of such important public policy by granting certiorari in the instant case. Finally, it would be inappropriate to grant certiorari in the instant case for the reason that Petitioner has failed throughout his pleadings in the district court to alleged with particularity any actual conspiracy between the parties involved, making it unnecessary for this Court to decide in the instant case whether or not the private parties were immune in the lawsuits below.

ARGUMENT

I. THERE DOES EXIST A CONFLICT AMONG THE CIRCUITS AS TO WHETHER A PRIVATE PARTY MAY BE HELD LIABLE UNDER 42 U.S.C. 1983 FOR AN ALLEGED CONSPIRACY BASED ON ACTS OF CONSPIRACY WITH AN OTHERWISE IMMUNE STATE OFFICIAL.

It is evident that there exists a conflict of authority regarding the question of whether a private individual may be held liable under 42 U.S.C. 1983 for conspiring with an otherwise immune state official. Several approaches have been taken by the various Courts of Appeal and other lower courts. Several circuits have adopted the rule that a private person may not be held liable under 42 U.S.C. 1983 for acts of conspiracy with an immune state official. This rule seems to have been adopted in the Third, Sixth and Ninth Circuits. See *Waits* v. *McGowan,* 516 F.2d 203 (3rd Cir. 1975); *Hazo* v. *Geltz,* 537 F.2d 747 (3rd Cir. 1976); *Kurz* v. *Michigan,* 548 F.2d 172 (6th Cir. 1977) *cert. den.* 434 U.S. 972 (1977), *reh. den.* 434 U.S. 1089 (1978); *Haldane* v. *Chagnon,* 345 F.2d 601 (9th Cir. 1965); *Sykes* v. *California,* 497 F.2d 197 (9th Cir. 1974); *Briley* v. *California,* 564 F.2d 849 (9th Cir. 1977). Several circuits, however, apply a rule of limited immunity for private persons alleged to have conspired with immune state officers, requiring a kind of "nexus" or particularized complaint of conspiracy. Such a rule has been adopted in the Seventh and Tenth Circuits. See *Sparkman* v. *McFarlin,* 601 F.2d 261 (7th Cir. 1979); *Norton* v. *Liddel,* 620 F.2d 1375 (10th Cir. 1980); *Shaffer* v. *Cook,* supra. Finally, two circuits have adopted the rule that a private person is liable under

42 U.S.C. 1983 regardless of the immunity of the state official they allegedly conspired with. This is the rule of the First and Fifth Circuits. See *Kermit Constr. Corp.* v. *Banco Credito Y Ahorro Ponceno,* 547 F.2d 1 (1st Cir. 1976); *Slotnick* v. *Staviskey,* 560 F.2d 31 (1st Cir. 1977), *cert. den.* 434 U.S. 1077 (1978); *Downs* v. *Sawtelle,* 574 F.2d 1 (1st Cir. 1978), *cert. den.* 439 U.S. 910 (1978); *Sparks* v. *Duval County Ranch Co., Inc.,* 604 F.2d 976 (5th Cir. 1979).

Several circuits have not decided the issue on the Court of Appeals level but have conflicting district court decisions. In the Fourth Circuit, the following cases support the rule that there is immunity for a private person for acts allegedly committed while conspiring with an immune state official. *Phillips* v. *Singletary,* 350 F.Supp. 297 (D.C. S.C. 1972); *Dennis* v. *Hein,* 413 F.Supp. 1137 (D.C. S.C. 1976). *Contra,* see *Adkins* v. *Adkins,* 459 F.Supp. 406 (D.C. W.Va. 1978). In the Eighth Circuit, see *Griffin* v. *Nangle,* 413 F. Supp. 913 (D.C. Mo. 1974), for the rule supporting immunity of a private party. Furthermore, see *Fine* v. *City of New York,* 529 F.2d 70 (2d Cir. 1975). While that case has been cited for authority that the Second Circuit has adopted the rule that there is no immunity for a private person conspiring with an immune state official, a closer examination of the case reveals the language is broad enough to negate the rule for which it allegedly stands. While this case states generally that a private citizen can be liable under 42 U.S.C. 1983 if he conspires with a state official, it never explicitly considers the question of whether the private actor is liable where the state actor is immune.

As could be expected there are varying rationales supporting the divergence of opinion on this issue. Those cir-

cuits which adopt a *per se* rule of immunity for private persons conspiring with immune state officials do so for several reasons. For one, it is believed that such a rule will discourage frivolous lawsuits from dissatisfied litigants in state courts. Related to this is the interest in preserving judicial federalism and avoiding having federal courts serve as monitors over state courts, providing additional remedies for the losing party therein. This is particularly true where the only state action complained of is that of furnishing a neutral forum to decide the private litigants' dispute.

A further interest supporting the rule of private immunity is that to adopt a contrary rule would discourage participation in the state judicial process. The fear is that both private persons who are victims and/or witnesses will be discouraged from participating in the state court process by fear of being penalized by civil rights suits. More importantly, many believe that in the absence of a *per se* rule of immunity the discretion and independence of state judges will be impaired. One basis for having judicial immunity is to preserve the independence of the state judiciary and to eliminate any liability for the exercise of the judge's discretion. Such an interest is effectively abrogated if, although the state judge is immune from suit, he is subject to being deposed or appearing as a witness in a civil case to explain the very acts for which he is immune. In addition, it is felt that there is something fundamentally unfair about subjecting a lay person to a civil rights action for the very same acts that one educated in the law, the judge, is immune. If the judge himself condones or participates in the acts on which the civil rights suit is based, it seems

unfair to hold lay persons liable for those very same acts. See Judge Sprecher's opinion, concurring, in *Sparkman* v. *McFarlin*, supra, at pp. 264-266. Finally, some courts feel that immunity for private parties is an outgrowth of the elements of 42 U.S.C. 1983 itself. In other words they find lacking the element of committing an act "under color of state law" where there is no state official acting and being held liable. *Haldane* v. *Chagnon*, supra, at pp. 604-605.

On the other hand, those who reject the immunity of private parties who conspire with state officials, do so on different grounds. They downplay the harm that would result from judges being compelled to testify in civil matters. In this regard they emphasize that the judge may be amenable to testify in claims for equitable relief or in cases where they are ordinary witnesses, such as habeas corpus or post-conviction relief proceedings. In addition, they downplay the value of exempting judges from being in the position of having to testify altogether, holding that this is not necessary to the independence of the judiciary. Finally, those opposing the *per se* rule of immunity reject the belief that "color of state law" and immunity are the same concepts. Instead, they contend that a person may act under color of state law and still be immune for his actions. Therefore, simply because one is not a state official nor acting in concert with one who is liable does not remove the element of "color of law". See, *Sparks* v. *Duval County Ranch Co., Inc.*, supra, at pp. 979-983.

There is a third view on the immunity issue as well. Several courts hold that while there should not be a *per se* rule of immunity for private persons who have conspired with state officials, such immunity should exist unless a

proper "nexus" is alleged between the acts of the state official and the private person. For example, in *Norton* v. *Liddel,* supra, the test enunciated was:

> "It is our view that the critical inquiry in making this determination is: Has the plaintiff demonstrated the existence of a significant nexus or entanglement between the absolute immune state official and the private party in relation to the steps taken by each to fulfill the objects of their conspiracy? The resolution of such issues must, of necessity, be made on a case-to-case basis." 620 F.2d at 1380.

In other words, the approach in *Norton* was one on a case-by-case basis. In those cases where the state official was merely acting in a neutral manner, such as providing forum for a lawsuit, issuing an order, and having no alleged interest in the outcome of the case, the nexus would not be deemed present.

> "Rather, we held that the State's action in issuing the *ex parte* temporary restraining order was not sufficiently entangled with the defendant private party's action so as to clothe the private party actions as that of the State's. Where a State, such as in *Torres,* does no more than furnish a neutral forum for the resolution of issues and has no interest in the outcome of the lawsuit, the State court's action in issuing an order cannot be imputed to the private party seeking the issuance of the order." *Norton* v. *Liddel,* supra, at 1380.

The court in *Norton,* however, held that the nexus could be met where there were allegations that the state officer did more partisan acts. Such acts could be where the state officer conspired with the private party to issue

an indictment against someone with absolutely no foundation and where the state had an interest in doing so.

> "We specifically observed that had the deputy sheriff *'colluded'* with the bank officer to misrepresent the contents of the order it would be a different matter." *Norton* v. *Liddel,* supra, at 1380.

Thus, the nexus discussed in *Norton,* supra, seems to require the existence of a connection between the private party's conduct and the state actor's conduct and that that connection must indicate that the state is an active and partisan conspirator in the action. The allegations must be such as to give rise to the possibility that both the immune state officer and the private party have engaged in overt abuse of judicial process. Otherwise, where the official and the private party are only conducting relatively neutral proceedings, the rule of immunity would apply. Also see *Sparkman* v. *McFarlin,* supra, where the per curiam opinion seems to agree that a private party could be liable where the conspiracy was alleged with particularity between the state officer and the private party. Such particular allegations and the various views of the judges of that circuit are outlined in the concurring opinions therein.

In summary, the circuit courts are at odds with how the question presented here should be properly resolved. While some of them adopt a *per se* rule of immunity for private persons conspiring with state officials, others have a more limited approach — utilizing the "nexus" approach. Still other circuits hold outright that a private party is liable even though he conspires with a public official who is otherwise immune. The conflict is such that this Court should resolve the issue once and for all for the guidance of lawyers and judges throughout the nation.

II. THIS IS NOT THE PROPER CASE FOR THE RESOLUTION OF SUCH AN IMPORTANT QUESTION OF PUBLIC POLICY.

The question of immunity of private persons under 42 U.S.C. 1983 is one of profound significance for lawyers and litigants throughout this country. However, this case is not a proper one for the resolution of that issue. The Petitioner is represented herein *pro se*. He has been throughout the entire course of these proceedings. Petitioner represented himself *pro se* throughout the Oklahoma County court proceedings, filing some four amended complaints before finally having his conspiracy count dismissed for the last time. In addition, said complaints alleged amounts ranging from five to ten million dollars against Respondents Jones and Lahman. When such lawsuits proved unsuccessful Petitioner persisted in litigation, going to federal court and suing both the lawyers and the judge in the Oklahoma court, for an amount in excess of $10 million. The pleadings throughout this case, including several amended petitions in federal court, demonstrate that this Petitioner is not able to effectivley represent himself or to effectively frame these issues for this Court's consideration. If the Court is to resolve such an important issue it should do so in a case where the issues may be briefed effectively and fully and the decision rendered on its merits rather than by default or by error.

In addition, the question of the liability of a private party who conspires with a state official does not need to be resolved in this case in order to properly dispose of the claim herein asserted. Even putting the immunity question aside, Petitioner does not state a valid cause of action

against these Respondents. For example, Petitioner's only allegation against Respondent Jones is that Jones "accepted the fraudulent acts" of Judge Cook and Larry Lahman in his behalf and filed an affidavit in the case "to further his conspiracy." The allegations against the other Respondents in this case likewise fail to state the proper elements of an action based on 42 U.S.C. 1983 since they are purely conclusionary. Therefore, the resolution of the immunity issue is not necessary in order to sustain the decision of the Tenth Circuit.

CONCLUSION

Wherefore, premises considered, Petitioner's petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Memorandum were mailed to the persons listed below on the ..... day of April 1981, by placing same in the U.S. Mail with postage fully prepaid.

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